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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1951.

No. 223

RAILWAY EXPRESS AGENCY, INCORPORATED,
*Petitioner,*

*vs.*

WILLIAM J. KENNEDY, ET AL.,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Railway Express Agency, Incorporated, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on June 5, 1951.

### OPINIONS BELOW.

The memorandum order of the District Court (R. 41) is unreported. The opinion of the Court of Appeals (R. 62-67) is not yet officially reported.

"registration period." Certain disqualifying conditions are provided by the Act, one of which, pertinent here, makes an employee ineligible for unemployment compensation if

> "* * * the Board finds that his unemployment was due to a stoppage of work because of a strike in the establishment * * * at which he was last employed, and the Board finds that such strike was commenced in violation of the provisions of [the Railway Labor Act] * * *." 45 U. S. C. § 354(a-2)(iii).

Despite this provision of the Act, the Railroad Retirement Board authorized the payment of unemployment benefits to employees of petitioner during a strike commenced under the following circumstances:

On June 1, 1950, petitioner received a letter from officers of Locals 808 and 459 of the International Brotherhood of Teamsters, which represent certain of petitioner's employees in the New York metropolitan area, requesting changes in hours of work, rates of pay and working conditions of those employees. (R. 12.) Thereafter, pursuant to the procedure set out in section 2, Second, of the Railway Labor Act, petitioner entered into negotiations with the representatives of these employees for the purpose of negotiating a new labor agreement. During the course of negotiations, however, a dispute arose which was not adjusted by the parties. (R. 27.) Accordingly, on September 21, 1950, acting pursuant to section 5, First of the Railway Labor Act, petitioner invoked the services of the National Mediation Board. (R. 31.)

Although the Mediation Board immediately wired officers of Locals 808 and 459 that its services had been invoked and that mediation would be assigned as quickly as possible (R. 32), the employees represented by these Locals rejected the services of the Board by commencing a strike against petitioner on September 23, 1950. (R. 29.)

Notwithstanding the fact that on October 3, 1950, the President appointed an Emergency Board under section 10 of the Railway Labor Act to investigate and report concerning the dispute (R. 33), the strike continued until October 12, 1950. (R. 29.)

With respect to the first 14 day period of the strike the Railroad Retirement Board authorized and paid unemployment benefits amounting to more than $90,000 to the employees here involved despite the provisions of 45 U. S. C. § 354(a-2)(iii) quoted above and even though they had been apprised of the fact that the employees had refused to comply with the procedures set out in the Railway Labor Act. (R. 37.) Upon receiving information of these payments, petitioner protested to the Board against the allowance of any further unemployment benefits to the striking employees and demanded in writing the right to be heard by the Board on the question whether the employees were disqualified from receiving compensation under the Railroad Unemployment Insurance Act. (R. 13-14.) On October 19, 1950, the Board denied petitioner's protest and demand on the ground that petitioner was not a "party properly interested." (R. 15-16.)

Having been informed by the Board that it intended to make further payments to petitioner's employees for the second registration period, petitioner brought suit in the United States District Court under 28 U. S. C. secs. 1337 and 1332, praying for an injunction restraining respondents from directing or authorizing such payments, which would have amounted to $38,103.75. (R. 37.)

On October 23, 1950, the District Court granted petitioner's motion for the issuance of a temporary restraining order. (R. 19.) Thereafter, the general counsel of the Railroad Retirement Board filed a motion on behalf of two of the three members of the Board to dismiss the complaint. (R. 34.) The District Court, after hearing, granted the gen-

eral counsel's motion. (R. 41.) The Court of Appeals for the Seventh Circuit affirmed on the grounds (1) that petitioner has no standing to challenge the action of the Railroad Retirement Board, and (2) that the Railroad Unemployment Insurance Act precludes judicial review of an award of unemployment benefits at the instance of an employer. An injunction pending appeal, entered by the District Court on the date it dismissed the complaint, is still in effect. (R. 44.)

**SPECIFICATION OF ERRORS TO BE URGED.**

The Court of Appeals erred:

1. In failing and refusing to hold that respondents violated their statutory duty in authorizing the payment of unemployment compensation from the Railroad Unemployment Insurance Account to employees who struck in violation of the provisions of the Railway Labor Act.

2. In holding that petitioner has no standing to sue to restrain the Railroad Retirement Board from making payments out of the Railroad Unemployment Insurance Account to employees who strike in violation of the Railway Labor Act.

3. In holding that the Railroad Unemployment Insurance Act precludes any judicial review of orders of the Railroad Retirement Board authorizing the payment of unemployment compensation to employees who strike in violation of the Railway Labor Act.

4. In affirming the judgment of the District Court.

**REASONS FOR GRANTING THE WRIT.**

1. Section 4(a-2)(iii) of the Railroad Unemployment Insurance Act, 45 U. S. C. § 354(a-2)(iii), which prohibits the payment of unemployment compensation to em-

ployees who strike in violation of the Railway Labor Act, was designed to encourage adherence by employees to the procedures established by that Act for the peaceful settlement of disputes and to insure that funds paid into the Unemployment Insurance Account by carriers pursuant to statute would not be used to finance unlawful strikes. The Railway Labor Act outlines four steps for the settlement of labor controversies between carriers and their employees: (1) there must be good faith negotiation by the carrier and representatives of its employees (sec. 2, Second); (2) in the event that a dispute is not adjusted by the parties in conference, either party may invoke the services of the Mediation Board, which shall use its best efforts to bring them to agreement (sec. 5, First); (3) if mediation is unsuccessful, the Mediation Board shall endeavor to induce the parties to submit to arbitration (sec. 5, First); and (4) if arbitration is refused, and the Mediation Board believes that the dispute threatens substantially to interrupt interstate commerce so that any section of the country will be deprived of essential transportation service, it must report that fact to the President, who may thereupon create an Emergency Board to investigate and report concerning the dispute (sec. 10). That section further provides:

> "After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose."

The complaint alleges, and it is not denied, that petitioner's employees struck after participating in only the first of four steps contemplated by the Railway Labor Act and only two days after the unions had been notified that petitioner had commenced the second step by invoking the services of the Mediation Board. Nevertheless, the

Railroad Retirement Board takes the position that petitioners did not strike in violation of the Act. The Board's theory is that the first three steps provided by the Railway Labor Act are directory only, so far as employees are concerned, and that the Act imposes no obligation upon the employees to refrain from striking except at the fourth step—*i. e.*, during the period after creation of an emergency board and for thirty days after such board has made its report to the President. (sec 10.)

The Board thus takes the position that employees of carriers are in no way inhibited from striking in flat disregard of the important statutory procedures set out in the Railway Labor Act for the peaceful settlement of labor disputes. Even under the Board's theory, however, the strike became illegal when continued for nine days after creation of an Emergency Board on October 3, 1950. It defends its decision to pay benefits during this period, nevertheless, on the ground that, while the continuation of the strike after October 3 was a violation of the Railway Labor Act, the strike was not "*commenced* in violation of" that Act so as to come within the prohibition of 45 U. S. C. § 354(a-2)(iii). The Board's tortured interpretation of these statutes is contrary to the decisions of this Court, to the decision of the Emergency Board appointed in this case, and to the specific provisions of the Railway Labor Act, and has produced a division of opinion within the Board itself.

(a) The Board has acknowledged that its decision is irreconcilable with this Court's statement of the duties imposed upon both parties by the Railway Labor Act. In *Elgin J. & E. R. Co.* v. *Burley,* 325 U. S. 711, 725 (1945), this Court said:

> "Beyond the initial stages of negotiation and conference, however, the procedures diverge. 'Major disputes' go first to mediation under the auspices of the

> National Mediation Board; if that fails, then to acceptance or rejection of arbitration, cf. § 7; *Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U. S. 50; and finally to possible presidential intervention to secure adjustment. § 10. For their settlement the statutory scheme retains throughout the traditional voluntary processes of negotiation, mediation, voluntary arbitration, and conciliation. Every facility for bringing about agreement is provided and pressures for mobilizing public opinion are applied. *The parties are required to submit to the successive procedures designed to induce agreement.* § 5 First (b). *But compulsions go only to insure that these procedures are exhausted before resort can be had to self-help.* No authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration." (Emphasis supplied.)

In its brief in the Court of Appeals the Board defended its position that the parties are *not* required "to submit to the successive procedures designed to induce agreement" on the ground that this Court's statement, quoted above, "was purely *obiter dictum*," which was made "without the deep and careful consideration which the Court would otherwise give to a point necessary to its decision." Whether or not this Court's statement was dictum, and whether or not an administrative agency should follow this Court's interpretation of a statute even if dictum, as do the federal courts, see *e. g. Riverside Cement Co.* v. *Rogan*, 59 F. Supp. 401, 404 (D. C. Cal., 1945), the Board's decision indicates a decisive conflict of opinion in respect of the proper interpretation of an important federal statute which should be resolved by this Court. Proper judicial administration would require this Court to review a decision of an inferior federal court expressly refusing to interpret a federal statute consistently with the interpretation given that statute by this Court. *A fortiori* the decision of an administrative body flatly contradicting the interpretation

given a federal statute by this Court should not go unreviewed except for compelling reasons. That there are no such reasons in this case will be demonstrated *infra*, pp. 12-23.[2]

(b) The Board's interpretation of the Railway Labor Act is contrary to that of the Emergency Board appointed by the President to investigate the facts of this very dispute. In its report to the President, of which this Court may take judicial notice, *Jackson* v. *United States*, 230 U. S. 1, 18 (1913), the Emergency Board stated at p. 10:

> "Under normal circumstances the Board would have recommended the increase be made retroactive to September 1, 1950, when other New York truck drivers got theirs. In view of the work stoppage, however, *which the Board believes was outside the spirit, if not the letter, of the Railway Labor Act*, we recommend that the increase be made retroactive to October 13, 1950, the day the strike ended." (Emphasis supplied.)

Thus, at the same time that one agency of the United States was calling attention to the failure of petitioner's employees to comply with the procedures of the Railway Labor Act, another agency was authorizing the payment of unemployment compensation to the strikers on the theory that they had no duty to comply with those procedures. This important conflict of opinion between the Railroad Retirement Board and the Emergency Board as to the proper interpretation of the Railway Labor Act presents an addi-

[2] The Board's interpretation of the Railway Labor Act is also wholly inconsistent with this Court's decision in *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515 (1937). There, the duty to negotiate in good faith for the settlement of disputes was specifically enjoined upon carriers, and this Court has held that the reasoning of that opinion applies equally to employees. *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 721 (1945). Respondents' view of the Act would require them to pay unemployment compensation during a strike called in flat violation of this duty to negotiate, which is the first step in the procedures established by the Act.

tional reason for the issuance by this Court of its writ of certiorari.[3]

(c) Finally, the interpretation adopted by a majority of the Railroad Retirement Board wholly disregards the purpose and intent of Congress in enacting the Railway Labor Act and the express statutory provisions of that Act. The Act clearly contemplates that before resorting to economic force the parties to a railway labor dispute must meet together to negotiate concerning the dispute, must accept the services of the National Mediation Board as mediator, must consider that Board's proposal of arbitration, and must maintain the status quo for thirty days after the report to the President of an Emergency Board. This procedure is obviously frustrated if employees are free to strike at any of the intermediate stages; yet that, in sum and substance, is the position taken by the Railroad Retirement Board.

The Board's ruling gives no effect whatever to the command of section 2, First of the Act that

> "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carriers growing out of the dispute between the carrier and the employees thereof."

[3] It should be noted, furthermore, that a controversy exists within the Railroad Retirement Board itself as to the propriety of the payments in this case. Although all members of the Board were served with summons and complaint, the general counsel has on all occasions appeared for only two members. Respondent Frank C. Squire has never authorized the general counsel to represent him in opposing petitioner's prayer for an injunction against the payment of compensation to the employees here involved and, upon the record, does not object to the entry of such an injunction. (R. 35.)

If participation in the procedures established by the Act is a "reasonable effort" to settle the dispute, therefore, the Act imposes the duty upon both parties to participate. *Cf. Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U. S. 50 (1944). The Railroad Retirement Board's decision in effect determines that there is no such duty.

The question of the extent of the obligation imposed upon employees by the Railway Labor Act is an important and recurring one.[4] The decision of the Railroad Retirement Board is flatly contrary to the express language and purpose of the Act and to the decisions of this Court and of the Emergency Board created in this case and is contrary to the announced position of the National Mediation Board.[5] The public interest in a proper and uniform application of an important federal statute requires this Court's consideration of the first question presented by this petition.

2. The Court of Appeals avoided decision of the propriety of the Railroad Retirement Board's ruling by holding that petitioner has no standing to sue to enjoin the unlawful payment by the Railroad Retirement Board of unemployment benefits. The court's theory was that the contributions which petitioner is required to pay into the Railroad Unemployment Insurance Account are a type of tax, and that a taxpayer has no standing to sue to prevent the unauthorized expenditure of federal funds under the doctrine of *Frothingham* v. *Mellon*, 262 U. S. 447 (1923). This holding not only represents a vast extension of the

[4] On June 19, 1951, the Secretary of the National Mediation Board notified the president of the Air Line Pilots' Association that the strike of United Air Line Pilots, which was called while the Board was mediating their dispute with the company, was illegal and that mediation services would be withdrawn until the strike was ended. The president of the union, on the other hand, contended that the strike was legal. See *New York Times* for June 20, 1951, p. 1.

[5] See footnote 4.

*Frothingham* rule but in fact is wholly inconsistent with that and other decisions of this Court.

In *Frothingham* v. *Mellon, supra,* a single taxpayer sought to enjoin the appropriation of moneys by Congress under the Maternity Act, 42 Stat. 224, on the ground that the Act was unconstitutional and that the making of such unlawful appropriations would increase her future tax burdens, thereby taking her property without due process of law. This Court held that she had no standing to sue for two reasons. First, the taxpayer's interest in the moneys of the federal treasury is a minute interest shared with millions of others; the effect upon future taxation of any payment out of the fund is so remote and undeterminable that "no basis is afforded for an appeal to the preventive powers of a court of equity." To be distinguished, said this Court, is the interest of a taxpayer of a municipality in the application of its moneys, which is sufficiently direct and immediate to justify resort to the injunctive powers of the courts to prevent misuse of the funds, citing *Crampton* v. *Zabriskie,* 101 U. S. 601, 609 (1879). 262 U. S. at 486, 487. Second, the Court has no power to review or annul acts of Congress except when a question under the act is presented to it by a claimant who has a special, individualized stake in it. That is,

> "The party who invokes the power [of the court] must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." 262 U. S. at 488.

Even if it is assumed that the "contributions" which carriers must make to the Railroad Unemployment Insurance Account under 45 U. S. C. § 358 are, in fact, taxes, it requires no more than a cursory examination of that stat-

ute to disclose that the effect of unlawful expenditures from the Account upon the unemployment compensation taxes of petitioner and other carriers is very different from the remote and minuscule effect of appropriations from the general funds of the federal government upon an individual's income taxes. The contributions which carriers must make under the Railroad Unemployment Insurance Act do not become part of the general funds of the Treasury; they are collected by the Board and deposited by it with the Secretary of the Treasury. 45 U. S. C. § 358(f). The Secretary maintains these moneys as a trust fund, and all such moneys are permanently available to the Board without further appropriation for the payment of unemployment and sickness benefits and may not be used for any other purpose. 45 U. S. C. § 360. And most important, the rate of taxation of petitioner and the other carriers subject to the Act is directly and arithmetically related to the amount in the trust fund. 45 U. S. C. § 358(a). See footnote 1, *supra*.

To say that petitioner and the other carriers have no more interest in the integrity of the trust fund than that held "in common with people generally" is to blind one's self to the undisputed facts. Indeed, the *only* persons adversely affected by the unlawful payments already made and about to be made by the Board are petitioner and a few hundred other carriers who must make up, by their contributions, the amounts unlawfully expended. While the balance in the Account amounted to over $700 million on September 30, 1950, so that the carriers are currently paying at the minimum rate of 0.5 per cent (R. 38), that balance is steadily decreasing. In the last two years, in fact, the balance in the account has dropped almost $200 million. Compare 13 Fed. Reg. 8282 with 15 Fed. Reg. 7903. While it cannot be said with exact certainty when and how much the

unlawful payment of unemployment benefits will affect the contribution rates which petitioner must pay, it can be said with complete accuracy that a definitely ascertained group—petitioner and the other carriers whom it represents—not "people generally," must pay for these unlawful benefit allowances and that they have a definite, concrete interest in preserving the fund from improper depletions. Certainly the interest here represented by petitioner is much greater and more precisely defined than that of a municipal taxpayer who seeks to enjoin municipal expenditures. *Crampton* v. *Zabriskie, supra,* approved in *Frothingham* v. *Mellon, supra* at p. 486 and in *Coleman* v. *Miller,* 307 U. S. 433, 445 (1939). Certainly, too, the interest of petitioner and the other carriers is much more an individual interest than that represented by the plaintiffs in the case last cited,[6] and is akin to that of the milk producers in *Stark* v. *Wickard,* 321 U. S. 288, 304-5 (1944).

In this case the Court of Appeals went no farther, before invoking the *Frothingham* doctrine, than to determine that the contributions made by petitioner and the other carriers to the Railroad Unemployment Insurance Account "constitute a type of tax." (R. 65.) It clearly stated an immutable principle that no federal taxpayer has standing to challenge the expenditure of federal funds, whatever the incidence of the tax and whatever the consequences to the taxpayer of the challenged expenditure. This holding, which cannot be supported by the rationale of the *Frothingham* case and is contrary to *Crampton* v. *Zabriskie, supra, Coleman* v. *Miller, supra, Stark* v. *Wickard, supra, Franklin Township* v. *Tugwell,* 85 F. 2d 208 (C. A. D. C., 1936), and *Buscaglia* v. *District Court of San*

[6] The plaintiffs in the *Coleman* case were members of the Kansas legislature who sought to restrain the formal acts of ratification by state officials of the Child Labor Amendment.

*Juan,* 145 F. 2d 274 (C. C. A. 1, 1945) among others, clearly raises important issues requiring the further consideration of this Court.

While state court rulings upon the adequacy of legal interest are not binding upon this Court, *Tyler* v. *Judges,* 179 U. S. 405 (1900), it is pertinent to point out that the state courts have uniformally recognized the interest of an employer in the legality of payment of unemployment benefits to his employees as sufficient to give him standing to sue. *Chrysler Corp.* v. *Smith,* 297 Mich. 438, 298 N. W. 87 (1941), *Carnegie-Illinois Steel Corp.* v. *Review Board,* 117 Ind. App. 379, 72 N. E. 2d 662 (1947); *Crossett Lumber Co.* v. *McCain,* 205 Ark. 631, 170 S. W. 2d 64 (1943); *Industrial Comm.* v. *Evans,* 52 Utah 394, 174 Pac. 825 (1918).

The court below sought to avoid the effect of these decisions by reliance upon this Court's decision in *Gange Lumber Co.* v. *Rowley,* 326 U. S. 295 (1945). In that case an employer claimed that it was denied due process of law by a state statute extending the period in which a workman might file claim for readjustment of workmen's compensation on account of aggravation of injury from three to five years. This Court held that the employer had failed to make a sufficient showing of interest to entitle it to question the *constitutionality* of the statute. This Court was not called upon, nor did it, consider the question whether an employer whose future contributions depend upon the balance in a fund has sufficient interest to challenge unlawful administrative action under the statute. As the Court's opinion is careful to point out throughout, the sole issue decided in that case was whether the employer had shown sufficient injury to justify a holding that the state statute had deprived him of his property without due process of law. The Court's answer was that it had not:

"*The Fourteenth Amendment,* through the due proc-

ess clause, does not assure protection from the state's regulatory powers against injuries so remote, contingent and speculative. Some substantial and more immediate harm must be shown to present a justiciable question *concerning the state's power.*" 326 U. S. at 305. (Emphasis supplied.)[7]

Had the Court decided the broad question of the sufficiency of the employer's interest to challenge unlawful administrative application of the statute, as the court below assumed, it would necessarily have disapproved all of the decisions cited on p. 16, *supra,* and a host of similar cases. That it did not do so is further and conclusively indicated by the fact that the Court laid considerable stress upon the employer's right under the state statute to receive notice of the claim, to participate fully in proceedings before the state administrative agency, and to obtain judicial review of the agency's decision, noting that "No complaint is made that appellant did not have full benefit of the Act's procedural protections." 326 U. S. at 302, note 10. If these "procedural protections" are important it is only because the employer has a real and individual interest affected by the agency's decision. The *Gange Lumber Co.* case thus not only recognizes the sufficiency of the employer's interest to attack agency action unlawfully depleting a fund to which he must contribute but emphasizes the need for procedural safeguards against such arbitrary action by administrative officials. The decision of the court below denying petitioner any such procedural protection in apparent reliance upon the *Gange Lumber Co.* case is not only an unwarranted extension of, but is contrary to, this Court's decision.

[7] In an article entitled "Standing to Challenge and to Enforce Administrative Action," 49 Col. L. Rev. 759, 788 (1949), Professor Davis reads the *Gange Lumber Co.* case as applying only to sufficiency of interest to challenge the *constitutionality* of a statute—the position taken by petitioner and rejected by the Court of Appeals.

3. Alternatively, the Court of Appeals held that, since the Railroad Unemployment Insurance Act provides for administrative and judicial review only at the instance of *employees* who challenge the denial of unemployment compensation, it must be read as precluding judicial review by *employers* of awards of such benefits. That holding, it is plain, confuses two separate and distinct principles often enunciated by this Court. It is one thing to find that Congress did not, in a particular statute, provide for judicial review of agency action taken thereunder. *Cf. Stark* v. *Wickard,* 321 U. S. 288 (1944). It is quite another to find that Congress intended that such action should not be subject to judicial review. *Cf. Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297 (1943). The court below apparently failed to comprehend the significance of that distinction. In contrast and in conflict, see *Air Line Dispatchers Association* v. *National Mediation Board* (C. A. D. C.), decided May 17, 1951. C. C. H. Labor Law Serv., ¶ 66, 340.

The parties are agreed that the Railroad Unemployment Insurance Act makes no specific provision for either administrative or judicial review at the instance of employers of decisions awarding unemployment benefits. It seems equally clear, however, that there is nothing in that Act which demonstrates that Congress intended to preclude judicial review of Railroad Retirement Board decisions flatly contrary to statutory directives. The statute sets out at 45 U. S. C., § 355(c) the review procedures to be followed by *employees* when their claims are denied, and subsection (f) provides for judicial review of final Board action in such cases. Respondents rely upon a portion of subsection (c) as support for their contention that employers are thereby precluded from seeking any judicial review:

"* * * Subject only to such review [the judicial re-

view provided for in subsection (f)], the decision of the Board upon all issues determined in such decision shall be final and conclusive for all purposes and shall conclusively establish all rights and obligations, arising under this chapter, of every party notified as hereinabove provided of his right to participate in the proceedings.

"Any issue determinable pursuant to this subsection and subsection (f) of this section shall not be determined in any manner other than pursuant to this subsection and subsection (f) of this section."

This provision is inapplicable by its very terms. Petitioner, it is conceded, was not a party notified "of his right to participate in the proceedings;" that right was specifically denied it. (R. 15-16.) Nor may the issue of the correctness of the Board's interpretation of the Railway Labor Act be determined "pursuant to this subsection and subsection (f) of this section" in this instance, since subsection (c) makes provision for administrative and judicial review only at the instance of employees denied benefits, not employers. Respondents thus have attempted to read into statutory language which does no more than chart the course that *employees* must follow in seeking review of adverse rulings a Congressional intent that *employers* shall have no means of checking the illegal and unwarranted payments by the Board from a fund which, by law, they are compelled to replenish. That language will not support such a construction.[8]

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[8] Respondents also rely upon similar language in 45 U. S. C., § 355(g), that:

"Findings of fact and conclusions of law in the determination of any claim for benefits or refund, *the determination of any other matter pursuant to subsection (c) of this section,* * * * shall be, except as provided in subsection (f) of this section, binding and conclusive for all purposes and upon all persons, * * * and shall not be subject to review in any

The situation thus presented is very much like that before the Court in *Stark* v. *Wickard, supra.* Here, as there, "there is no direct judicial review granted by this statute for these proceedings." 321 U. S. at 307-8. Similarly, "the Act bears on its face the intent to submit many questions arising under its administration to judicial review." *Id.* at 308. There, as here, "It is because every dollar of deduction comes from the [employer] that he may challenge the use of the fund." *Ibid.* In considering whether the statute there involved precluded judicial review this Court said:

> "With this recognition by Congress of the applicability of judicial review in this field, it is not to be lightly assumed that the silence of the statute bars from the courts an otherwise justiciable issue, * * *. Here there is no forum, other than the ordinary courts, to hear this complaint. When, as we have previously concluded in this opinion, definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law, the silence of Congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction." 321 U. S. at 309.

Congress clearly adopted this view in enacting the Administrative Procedure Act, 5 U. S. C. § 1001 *et seq.* Section 10(c) provides that, except where statutes preclude judicial review or agency discretion is involved, "every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review." A Congressional intent to withhold judicial review of

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manner other than that set forth in subsection (f) of this section." (Emphasis supplied.)

This provision also, by its terms, relates only to matters determined pursuant to subsection (c), which relates wholly to review at the instance of employees and is concededly inapplicable to petitioner.

agency action must be clearly and convincingly demonstrated. As the House Judiciary Committee put it:

> "Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board. The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases. To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review." H. R. Rep. No. 1980, 79th Cong. 2d Sess., p. 41 (1946).

To hold in this case, as did the Court of Appeals, that the provisions of the Railroad Unemployment Insurance Act granting review to employees preclude judicial review of the Board's action at the instance of employers is to hold that all the statutory commands with respect to disqualification of employees were intended by Congress to be merely advisory and that Congress intended to give the Board a blank check for the disbursement of funds to employees. For, if petitioner is denied the right to challenge the action of the Board, there is no check whatever upon the Board's prodigality in disbursing funds contributed by petitioner and other carriers under the Act. If the Court of Appeals is correct, Congress intended that the Board should have authority to disregard the disqualification provisions of the Act as it saw fit, even to the extent, for example, of paying compensation to employees who were not unemployed. Clearly, Congress did not in-

tend to delegate such broad legislative and judicial powers to the Board. Nothing in the statute or its legislative history indicates that decisions awarding benefits which were beyond the authority of the Board to make—at least those decisions which, in the light of the disqualification provisions, are arbitrary and without support in law or fact—were to be unreviewable in the courts. Indeed, this Court has rejected the contention that a final administrative order is "not reviewable by any court even though entered arbitrarily, without substantial supporting evidence, and in defiance of law" as "out of harmony with the general legislative pattern of administrative and judicial relationships." *United States* v. *Interstate Commerce Commission,* 337 U. S. 426, 433-4 (1949). See *Parker* v. *Fleming,* 329 U. S. 531, 537 (1947). In the instant case, as in *Fleming* v. *Moberly Milk Products Co.,* 160 F. 2d 259, 265 (C. A. D. C. 1947),

> "If the judiciary has no power in such matter, the only practical restraint would be the self-restraint of the executive branch. Such a result is foreign to our concept of the division of the powers of government."

The Court of Appeals failed to give adequate—if, indeed, it gave any—consideration to the principles enunciated by this Court and by Congress governing the question of reviewability of agency action. The decision in this case stands as a precedent against any future action by an employer seeking to restrain the payment of unemployment benefits under the Railroad Unemployment Insurance Act on grounds other than coverage, no matter how arbitrary and capricious the Board's action and no matter how immediate and drastic the effect upon the carrier.

The questions presented by this petition involve not only the rights of this petitioner but of every carrier subject to these statutes; they involve not only this particular

dispute but every future case in which carrier employees strike prior to the appointment of an Emergency Board under the Railway Labor Act; they involve not only this payment out of the Railroad Unemployment Insurance Account but the right of any person at any time to invoke the equity powers of the courts to prevent the illegal depletion of the trust fund. The issues are narrowly defined but broadly significant. The proper administration of the Railroad Unemployment Insurance Act and the resolution of conflicting interpretations of the Railway Labor Act depend upon this Court's action upon this petition.

## CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated August 1, 1951.

## APPENDIX A.

### Railway Labor Act.

(45 U. S. C. § 151 *et seq.*)

* * * * *

**§ 152. General duties—Duty of carriers and employees to settle disputes.**

First. It shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

**Consideration of disputes by representatives.**

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

* * * * *

**§ 155. Functions of Mediation Board—Disputes within jurisdiction of Mediation Board.**

First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

## Railroad Unemployment Insurance Act.

(45 U. S. C. § 351 *et seq.*)

* * * * *

**§ 354. Disqualifying conditions—Day of unemployment or day of sickness.**

* * * * *

**Day of unemployment.**

(a-2) There shall not be considered as a day of unemployment, with respect to any employee—

* * * * *

(iii) subject to the provisions of subsection (b) of this section, any day with respect to which the Board finds that his unemployment was due to a stoppage of work because of a strike in the establishment, premises, or enterprises at which he was last employed, and the Board finds that such strike was commenced in violation of the provisions of chapter 8 of this title or in violation of the established rules and practices of a bona fide labor organization of which he was a member;

* * * * *

**§ 355. Claims for benefits.**

* * * * *

**Hearing and review of decisions on claims.**

(c) Each qualified employee whose claim for benefits has been denied in whole or in part upon an initial determination with respect thereto upon a basis other than one which is reviewable pursuant to one of the succeeding paragraphs of this subsection, shall be granted an opportunity for a fair hearing thereon before a referee or such other reviewing body as the Board may establish or assign thereto.

Any claimant whose claim for benefits has been denied in an initial determination with respect thereto upon the

basis of his not being a qualified employee, and any claimant who contends that under an initial determination of his claim he has been awarded benefits at less than the proper rate, may appeal to the Board for the review of such determination. Thereupon the Board shall review the determination and for such review may designate one of its officers or employees to receive evidence and to report to the Board thereon together with recommendations. In any such case the Board or the person so designated shall, by publication or otherwise, notify all parties properly interested of their right to participate in the proceeding and, if a hearing is to be held, of the time and place of the hearing. At the request of any party properly interested the Board shall provide for a hearing, and may provide for a hearing on its own motion. The Board shall prescribe regulations governing the appeals provided for in this paragraph and for decisions upon such appeal.

In any case in which benefits are awarded to a claimant in whole or in part upon the basis of pay earned in the service of a person or company found by the Board to be an employer as defined in this chapter but which denies that it is such an employer, such benefits awarded on such basis shall be paid to such claimant subject to a right of recovery of such benefits. The Board shall thereupon designate one of its officers or employees to receive evidence and to report to the Board on whether such benefits should be repaid. The Board may also designate one of its officers or employees to receive evidence and report to the Board whether or not any person or company is entitled to a refund of contributions or should be required to pay contributions under this chapter, regardless of whether or not any claims for benefits will have been filed upon the basis of service in the employ of such person or company, and shall follow such procedure if contributions are assessed and payment is refused or payment is made and a refund claimed upon the basis that such person or company is or will not have been liable for such contributions. In any such case the Board or the person so designated shall, by publication or otherwise, notify all parties properly interested of their right to participate in the proceeding and, if a hearing is to be held, of the time and place of the hear-

ing. At the request of any party properly interested the Board shall provide for a hearing, and may provide for a hearing on its own motion. The Board shall prescribe regulations governing the proceedings provided for in this paragraph and for decisions upon such proceedings.

Final decisions of the Board in the cases provided for in the preceding two paragraphs shall be communicated to the claimant and to the other interested parties within fifteen days after it is made. Any properly interested party notified, as hereinabove provided, of his right to participate in the proceedings may obtain a review of any such decision by which he claims to be aggrieved or the determination of any issue therein in the manner provided in subsection (f) of this section with respect to the review of the Board's decisions upon claims for benefits and subject to all provisions of law applicable to the review of such decisions. Subject only to such review, the decision of the Board upon all issues determined in such decision shall be final and conclusive for all purposes and shall conclusively establish all rights and obligations, arising under this chapter, of every party notified as hereinabove provided of his right to participate in the proceedings.

Any issue determinable pursuant to this subsection and subsection (f) of this section shall not be determined in any manner other than pursuant to this subsection and subsection (f) of this section.

**Decisions of reviewing bodies; review and finality.**

(d) The Board shall prescribe regulations governing the filing of cases with and the decisions of cases by reviewing bodies, and the review of such decisions. The Board may provide for intermediate reviews of such decisions by such bodies as the Board may establish or assign thereto. The Board may (i) on its own motion review a decision of an intermediate reviewing body on the basis of the evidence previously submitted in such case, and may direct the taking of additional evidence, or (ii) permit such parties as it finds properly interested in the proceedings to take appeals to the Board. Unless a review or an appeal is had pursuant to this subsection, the decision of

an intermediate reviewing body shall, subject to such regulations as the Board may prescribe, be deemed to be the final decision of the Board.

**Application of rules of evidence in law and equity; notice of findings.**

(e) In any proceeding other than a court proceeding, the rules of evidence prevailing in courts of law or equity shall not be controlling, but a full and complete record shall be kept of all proceedings and testimony, and the Board's final determination, together with its findings of fact and conclusions of law in connection therewith, shall be communicated to the parties within fifteen days after the date of such final determination.

**Review of final decision of Board by Circuit Courts of Appeals; costs.**

(f) Any claimant, or any railway labor organization organized in accordance with the provisions of chapter 8 of this title, of which claimant is a member, or any other party aggrieved by a final decision under subsection (c) of this section, may, only after all administrative remedies within the Board will have been availed of and exhausted, obtain a review of any final decision of the Board by filing a petition for review within ninety days after the mailing of notice of such decision to the claimant or other party, or within such further time as the Board may allow, in the United States circuit court of appeals for the circuit in which the claimant or other party resides or will have had his principal place of business or principal executive office, or in the United States Circuit Court of Appeals for the Seventh Circuit or in the Court of Appeals for the District of Columbia. A copy of such petition, together with initial process, shall forthwith be served upon the Board or any officer designated by it for such purpose. Service may be made upon the Board by registered mail addressed to the Chairman. Within fifteen days after receipt of service, or within such additional time as the court may allow, the Board shall certify and file with the court in which such petition has been filed a transcript of the record upon which the findings and decision complained of are based. Upon

such filing the court shall have exclusive jurisdiction of the proceeding and of the question determined therein, and shall give precedence in the adjudication thereof over all other civil cases not otherwise entitled by law to precedence. It shall have power to enter upon the pleadings and transcript of the record a degree affirming, modifying or reversing the decision of the Board, with or without remanding the cause for rehearing. The findings of the Board as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive. No additional evidence shall be received by the court, but the court may order additional evidence to be taken before the Board, and the Board may, after hearing such additional evidence, modify its findings of fact and conclusions and file such additional or modified findings and conclusions with the court, and the Board shall file with the court a transcript of the additional record. The judgment and decree of the court shall be final, subject to review as in equity cases.

An applicant for review of a final decision of the Board concerning a claim for benefits shall not be liable for costs, including costs of service, or costs of printing records, except that costs may be assessed by the court against such applicant if the court determines that the proceedings for such review have been instituted or continued without reasonable ground.

**Finality of Board decisions.**

(g) Findings of fact and conclusions of law of the Board in the determination of any claim for benefits or refund, the determination of any other matter pursuant to subsection (c) of this section, and the determination of the Board that the unexpended funds in the account are available for the payment of any claim for benefits or refund under this chapter, shall be, except as provided in subsection (f) of this section, binding and conclusive for all purposes and upon all persons, including the Comptroller General and any other administrative or account-

ing officer, employee, or agent of the United States, and shall not be subject to review in any manner other than that set forth in subsection (f) of this Section.

* * * * *

**§ 358. Contributions—Employers' contributions.**

(a) Every employer shall pay a contribution, with respect to having employees in his service, equal to the percentage determined as set forth below of so much of the compensation as is not in excess of $300 for any calendar month paid by him to any employee for services rendered to him after June 30, 1939; Provided, however, That if compensation is paid to an employee by more than one employer with respect to any such calendar month, the contributions required by this subsection shall apply to not more than $300 of the aggregate compensation paid to said employee by all said employers with respect to such calendar month, and each employer other than a subordinate unit of a national railway-labor-organization employer shall be liable for that proportion of the contribution with respect to such compensation paid by all such employers which the compensation paid by him after December 31, 1947, to the employee for services during any calendar month after 1946 bears to the total compensation paid by all such employers after December 31, 1946, to such employee for services rendered during such month; and in the event that the compensation so paid by such employers to the employee for services rendered during such month is less than $300, each subordinate unit of a national railway-labor-organization employer shall be liable for such proportion of any additional contribution as the compensation paid by such employer after December 31, 1946, to such employee for services rendered during such month bears to the total compensation paid by all such employers after December 31, 1946, to such employee for services rendered during such month:

1. With respect to compensation paid prior to January 1, 1948, the rate shall be 3 per centum;

2. With respect to compensation paid after December 31, 1947, the rate shall be as follows:

| If the balance to the credit of the railroad unemployment insurance account as of the close of business on September 30 of any year, as determined by the Board is: | The rate with respect to compensation paid during the next succeeding calendar year shall be: |
|---|---|
| $450,000,000 or more | ½ percent. |
| $400,000,000 or more but less than $450,000,000 | 1 percent. |
| $350,000,000 or more but less than $400,000,000 | 1½ percent. |
| $300,000,000 or more but less than $350,000,000 | 2 percent. |
| $250,000,000 or more but less than $300,000,000 | 2½ percent. |
| Less than $250,000,000 | 3 percent. |

As soon as practicable following June 23, 1948, the Board shall determine and proclaim the balance to the credit of the account as of the close of business on September 30, 1947, and on or before December 31, of 1948 and of each succeeding year, the Board shall determine and proclaim the balance to the credit of the account as of the close of business on September 30 of such year.

* * * * *

(f) The contributions required by this chapter shall be collected by the Board and shall be deposited by it with the Secretary of the Treasury of the United States, such part thereof as equals 0.2 per centum of the total compensation on which such contributions are based to be deposited to the credit of the fund and the balance to be deposited to the credit of the account.

* * * * *

**§ 360. Railroad unemployment insurance account—Funds constituting account; availability for benefits or refunds.**

(a) The Secretary of the Treasury shall maintain in the unemployment trust fund established pursuant to section 1104 of Title 42 an account to be known as the railroad unemployment insurance account. This account shall consist of (i) such part of all contributions collected pursuant to section 358 of this title as is in excess of 0.2 per

centum of the total compensation on which such contributions are based, together with all interest collected pursuant to section 358 (g) of this title; (ii) all amounts transferred or paid into the account pursuant to section 363 or section 364 of this title; (iii) all additional amounts appropriated to the account in accordance with any provision of this chapter or with any provision of law now or hereafter adopted; (iv) a proportionate part of the earnings of the unemployment trust fund, computed in accordance with the provisions of section 1104(e) of Title 42; (v) all amounts realized in recoveries for overpayments or erroneous payments of benefits; (vi) all amounts transferred thereto pursuant to section 361 of this title; (vii) all fines or penalties collected pursuant to the provisions of this chapter; and (viii) all amounts credited thereto pursuant to section 352(f) or section 362(g) of this title. Notwithstanding any other provision of law, all moneys credited to the account shall be mingled and undivided, and are permanently appropriated to the Board to be continuously available to the Board without further appropriation, for the payment of benefits and refunds under this chapter, and no part thereof shall lapse at any time, or be carried to the surplus fund or any other fund.

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# In the Supreme Court of the United States

OCTOBER TERM, 1951

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No. 223

RAILWAY EXPRESS AGENCY, INCORPORATED,
PETITIONER

*v.*

WILLIAM J. KENNEDY, FRANK C. SQUIRE AND HORACE W. HARPER, INDIVIDUALLY AND AS MEMBERS OF THE RAILROAD RETIREMENT BOARD OF THE UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE RESPONDENTS KENNEDY AND HARPER IN OPPOSITION

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### OPINIONS BELOW

The memorandum order of the United States District Court for the Northern District of Illinois, Eastern Division (R. 41) is reported at 95 F. Supp. 788. The opinion of the United States Court of

Appeals for the Seventh Circuit (R. 62-67) is reported at 189 F. 2d 801.

### JURISDICTION

The judgment of the Court of Appeals was entered on June 5, 1951 (R. 68). The petition for a writ of certiorari was filed on August 3, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether Section 5 of the Railroad Unemployment Insurance Act precludes suit by an employer to enjoin the payment of unemployment benefits to its employees.

2. Whether petitioner, an employer admittedly subject to the Railroad Unemployment Insurance Act, lacks legal standing to maintain an action to enjoin the payment of unemployment benefits to its employees.

### STATUTE INVOLVED

The pertinent provisions of Section 5 of the Railroad Unemployment Insurance Act (Act of June 25, 1938, 52 Stat. 1094, 1099, as amended by the Act of July 31, 1946, 60 Stat. 738, 45 U.S.C. 355) are set forth in the Appendix, *infra,* pp. 19-23.

### STATEMENT

This is an action to restrain the respondents, individually and as members of the Railroad Retirement Board, from directing or permitting the payment of unemployment benefits out of the Rail-

road Unemployment Insurance Account to any of petitioner's employees represented by Locals 808 and 459 of the International Brotherhood of Teamsters for days of work lost as a result of an alleged unlawful strike commenced by those Locals against petitioner on September 23, 1950. The district court dismissed the complaint on respondents'[1] motion to dismiss; the court of appeals affirmed.

The facts alleged in the complaint are as follows: The strike involved employees of petitioner who were members of two Locals of the Teamsters' Union in the New York metropolitan area. On June 1, 1950, the unions requested certain changes in the existing contract between the unions and petitioner (R. 6, 12). Thereafter, for a period of several weeks, petitioner and representatives of the unions engaged in negotiations for a new agreement (R. 6). On September 21, 1950, after negotiations had failed, petitioner invoked the services of the National Mediation Board (R. 6, 29, 31). On the following day, September 22, the Mediation Board notified the parties that its services had been requested (R. 29, 32). On the next day, September 23, the employees went out on strike (R. 6, 29). On October 3, 1950, an Emergency Board was created by Executive Order to investigate the dispute and to report its findings to the President (R.

[1] The motion to dismiss was filed on behalf of two of the three members of the Railroad Retirement Board, Kennedy and Harper (R. 34-35).

6, 29, 33). As a result of conferences held by the Emergency Board with representatives of the unions and petitioner, the employees returned to work on October 12, 1950 (R. 6, 29-30).

Under the provisions of the Railroad Unemployment Insurance Act (45 U.S.C. 351 *et seq.*), benefits totalling about $90,000 were paid to some 2,600 of petitioner's employees for the first registration period of unemployment, ending on or about October 7, 1950 (R. 7, 37). On October 11, 1950, petitioner wrote the Railroad Retirement Board, protesting the allowance of unemployment benefits to its employees, and demanded that it be heard on the issue of whether the strike was illegal (R. 7, 13). On October 18, 1950, the Board advised petitioner that the issue of whether the strike was unlawfully commenced within the meaning of Section 4(a-2) (iii) of the Railroad Unemployment Insurance Act (45 U.S.C. 354(a-2)(iii)) had been properly adjudicated, and that petitioner had no standing to appear in such proceedings (R. 7-8, 15-16).

Petitioner then instituted this suit in the District Court for the Northern District of Illinois, Eastern Division, to enjoin the additional payment of $38,103.75 in unemployment benefits for the second registration period (R. 8, 37). The complaint alleged that petitioner has no adequate remedy at law in that there is no provision in the Railroad Unemployment Insurance Act, or any other act, whereby petitioner could appear before the Board

and be heard, or could effect an appeal to any competent court from a decision of the Board (R. 9).

A temporary restraining order was entered by the district court on October 23, 1950 (R. 19-20). Subsequently, upon petitioner's motion for an injunction and upon respondents' motion to dismiss the action, the district court revoked the temporary restraining order and denied the prayer for an injunction (R. 43). Holding that the action is an unconsented suit against the United States, that petitioner has no statutory right to contest the findings and decisions of the Board, that petitioner lacks standing to sue, and that petitioner's employees are indispensable parties who have not been joined, the district court dismissed the complaint without reaching the question of whether the strike had been unlawfully commenced (R. 42-43).[2] On appeal, the court below affirmed, holding that the Railroad Unemployment Insurance Act precludes judicial review in the instant case, and that petitioner, in any event, lacks standing to sue (R. 62-67).

## ARGUMENT

The decisions of both courts below, holding that petitioner is not entitled to judicial review, are, we submit, clearly correct; there is no conflict, and no other ground for review by this Court.

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[2] A temporary injunction pending appeal, entered by the district court on the date it dismissed the complaint, is still in effect (R. 44, 69).

1. Petitioner concedes that the Act does not provide for judicial review at the instance of employers in cases such as the one at bar. It contends, however, that the Act does not evince clearly and convincingly the intent of Congress to withhold judicial review and, accordingly, that the Act should not be construed to deny appropriate equitable relief (Pet. 18-23).[3] We submit, to the contrary, that the Act, on its face, leaves no room for doubt.

Section 5(b) (45 U.S.C. 355(b)) authorizes the Board "to make findings of fact with respect to any claim for benefits and to make decisions as to the right of any claimant to benefits." Subsection (g) (45 U.S.C. 355(g)) provides that: "findings of fact and conclusions of law of the Board in the determination of any claim for benefits or refund, the determination of any other matter pursuant to subsection (c) of this section, and the determination of the Board that the unexpended funds in the account are available for the payment of any claim for benefits or refund under this Act shall be, except as provided in subsection (f) of this section, binding and conclusive for all purposes and upon all persons, including the Comptroller General and any other administrative or accounting officer, em-

[3] Petitioner does not here argue that Congress could not constitutionally preclude judicial review of the expenditure of the federal funds challenged herein. Cf. *Lynch* v. *United States*, 292 U.S. 571, 581-582, 587; *Butte, A. & P. Ry. Co.* v. *United States*, 290 U.S. 127, 142, 143; *Work* v. *Rives*, 267 U.S. 175, 181-182; *United States* v. *Babcock*, 250 U.S. 328, 331.

ployee, or agent of the United States, and shall not be subject to review in any manner other than that set forth in subsection (f) of this section."

Review under subsection (f) (45 U.S.C. 355(f)) is limited, by its terms, to review in the several courts of appeals of "a final decision under subsection (c) of this section." In turn, subsection (c) (45 U.S.C. 355(c)) provides for an appeal to the Board from initial determinations by employees or officers of the Board by (1) "any claimant who contends that under an initial determination of his claim he has been awarded benefits at less than the proper rate;" (2) "any claimant whose claim for benefits has been denied in an initial determination with respect thereto upon the basis of his not being a qualified employee;" (3) an employer "in any case in which benefits are awarded to a claimant in whole or in part upon the basis of pay earned in the service of a person or company found by the Board to be an employer as defined in this Act but which denies that it is such an employer," or "if contributions are assessed and payment is refused or payment is made and a refund claimed upon the basis that such person or company is or will not have been liable for such contributions;" and (4) by "each qualified employee whose claim for benefits has been denied in whole or in part upon an initial determination with respect thereto upon a basis other than one" above specified. (See Sec. 4, 45 U.S.C. 354). Subsection (c) further provides that "any issue determinable pursuant to this sub-

section and subsection (f) of this section shall not be determined in any manner other than pursuant to this subsection and subsection (f)."

The statutory scheme, accordingly, is as follows: An appeal may be had to the Board where an employee's claim for benefits is denied in whole or in part, or where the employer challenges the finding that the claimant is a qualified employee of an employer covered by the Act. No appeal to the Board is provided where a qualified employee's claim for benefits is allowed. Where an appeal is permitted by subsection (c), exclusive jurisdiction to review the Board's determination is conferred upon the several courts of appeals. But in those cases where no administrative review is provided for in subsection (c), such as the case at bar, the decision of the Board is made "binding and conclusive for all purposes and upon all persons" by subsection (g).

Petitioner's assertion that subsection (g) "relates only to matters determined pursuant to subsection (c), which relates wholly to review at the instance of employees and is concededly inapplicable to petitioner" (Pet. 19-20, fn. 8), conveniently ignores the fact that subsection (g) grants finality, except in so far as review is authorized in subsection (f), to three classes of determinations: (1) "the determination of any claim for benefits or refund," (2) "the determination of any other matter pursuant to subsection (c) of this section," and (3) "the determination of the Board that the

unexpended funds in the account are available for the payment of any claim for benefits or refund under this Act." Plainly, the conjunctive specification of three classes of determinations precludes the interpretation suggested by petitioner that subsection (g) relates only to determinations made under subsection (c). Petitioner's reading of subsection (g) is further belied by the express provision therein that the specified determinations shall be binding and conclusive upon the Comptroller General and any other administrative or accounting officer—an inappropriate provision if subsection (g) is inapplicable, as petitioner contends, to initial determinations which make awards of benefits.[4]

Finally, any possible doubt as to the intention of Congress is completely dispelled by the Administrative Procedure Act (Act of June 11, 1946, 60 Stat. 237, as amended, 5 U.S.C. 1001 *et seq.*). Section 2 (a) (1) of the Administrative Procedure Act (5 U.S.C. 1001 (a)) expressly exempts "agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them"—in which

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[4] Petitioner has apparently here abandoned the argument advanced below that subsection (g) is inapplicable to awards of benefits on the ground that, where a claim is granted upon an initial determination, there are no findings of fact or conclusions of law by the Board. Section 12(m) (45 U.S.C. 362(m)) expressly provides that "the Board is authorized to delegate to any member, officer, or employee of the Board any of the powers conferred upon the Board by this Act, excluding only the power to prescribe rules and regulations." See 20 C.F.R. (1949 ed.) 320.5; R. 36-37.

classification the Board admittedly falls (see 45 U.S.C. 228 j)—from all except the publicity requirements of Section 3 of that Act (5 U.S.C. 1002). See Sen. Doc. No. 248, 79th Cong., 2d sess., pp. 253, 307, 355; 92 Cong. Rec. 2152, 5649; Attorney General's Manual on the Administrative Procedure Act (1947), p. 11.[5] An obvious purpose of this provision was to leave judicial review of orders of agencies of this type within the precisely defined limits of the substantive statute. We submit, therefore, that the literal language of Section 5 of the Railroad Unemployment Insurance Act plainly manifests the intention of Congress to preclude judicial review in cases such as the one at bar (cf. *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297); when that language is read in conjunction with Section 2(a) (1) of the Administrative Procedure Act, there can be no reasonable doubt of that intention.[6]

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[5] Accordingly, the review provisions of Section 10 of the Administrative Procedure Act (5 U.S.C. 1009) relied upon by petitioner (Pet. 20) lend no support to petitioner. It is to be noted, moreover, that Section 10 of the Administrative Procedure Act is, by its own terms inapplicable to a case such as this wherein judicial review is precluded by statute.

[6] It is pertinent to observe that employers have been well aware that the Railroad Unemployment Insurance Act does not permit them to question the payment of benefits. See the statement of a representative of the Association of American Railroads in Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 75th Cong., 3d sess., on H.R. 10127, p. 214, and in Hearings before the Committee on Interstate Commerce, United States Senate, 75th Cong., 3d sess., on S. 3772, p. 125, that "there is no appeal provided anywhere in the bill for the railroads which pay the freight." The absence of a right

2. Even assuming, however, that the Act does not preclude the judicial review sought herein, jurisdiction is absent because of petitioner's lack of standing to sue. Cf. *Gange Lumber Co.* v. *Rowley*, 326 U. S. 295. In the *Gange* case, *supra*, this Court held that an employer, whose future contributions to a state industrial insurance fund depended in part upon its own cost experience, had not made a sufficient showing of direct legal injury to entitle it to question the constitutionality of a statute extending the time in which an employee might file a claim for additional compensation. Petitioner seeks to distinguish the *Gange* case, *supra*, on the ground that it here challenges administrative action under the Act and not the constitutionality of the Act, but there is no suggestion in the Court's opinion in the *Gange* case, *supra*, that the considerations governing justiciability, therein applied to constitutional issues, are not equally applicable to non-constitutional issues. To

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to appeal a benefit payment determination was noted again in connection with the 1946 amendments of the Act by a representative of the Railway Labor Executives' Association (although only "annuities" were mentioned specifically, the discussion concerned judicial review provisions which the amendments were to make common to both the Railroad Retirement and Unemployment Insurance Acts—Section 11 of the Retirement Act, 45 U.S.C. 228k, incorporating the judicial review provisions of the Unemployment Insurance Act). See Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 79th Cong., 1st sess., on H.R. 1362, p. 1091. And there is nothing in the 1948 amendments of the Railroad Unemployment Insurance Act (62 Stat. 576, 577-578), by which the employers were accorded reduced contribution rates, which indicates any intention to grant them a right to appeal a benefit payment determination.

the contrary, it is well-settled that one seeking to challenge administrative action must demonstrate that he has sustained or is immediately in danger of sustaining some direct injury to a private legal right.[7] Cf. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 125, 129; *Stark* v. *Wickard*, 321 U. S. 288, 304, 309. Indeed, less than two months after this Court's decision in the *Gange* case, it reiterated that principle in *Schenley Distillers Corp.* v. *United States*, 326 U. S. 432, 435. And, more recently, it stated that "administrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." *Chicago & S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103, 112-113.

Clearly, the administrative action questioned herein does not fix petitioner's legal relationship, nor does it deny any legal right of petitioner. As in the *Gange* case, *supra*, petitioner herein has no vested right or interest in the Railroad Unemployment Insurance Account. The contributions to the Account paid by the carriers constitute a type of tax and are public monies held and administered

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[7] This requirement may be relaxed where Congress has specifically authorized judicial review at the behest of those adversely affected or aggrieved even though no legal injury was sustained. Cf. *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470; *Scripps-Howard Radio* v. *FCC*, 316 U.S. 4; *FCC* v. *National Broadcasting Co. (KOA)*, 319 U.S. 239. This source of standing to sue, however, is not available to petitioner since, admittedly, Congress did not provide for judicial review by employers of awards of benefits (Pet. 18).

by the Government. See Section 8(h) of the Act, 45 U.S.C. 358(h); H.R. Rept. No. 2668, 75th Cong., 3d sess., p. 8; cf. *Steward Machine Co.* v. *Davis,* 301 U. S. 548; *Carmichael* v. *Southern Coal Co.,* 301 U. S. 495. Consequently, the payment of awards out of the Account in itself could not deprive petitioner of any right, and petitioner apparently does not contend otherwise.

Petitioner does contend, however, as did the employer in the *Gange* case, *supra,* that it has an interest in the integrity of the Account since the unlawful payment of unemployment benefits will affect the contribution rates which petitioner must pay (Pet. 14-15). In effect, therefore, petitioner urges that it has standing to sue because the challenged administrative action may impose further tax obligations upon it. But it has been held that a federal taxpayer has no standing to challenge the expenditure of federal funds even though such expenditure might possibly result in an increase in the taxes which he will eventually be compelled to pay. Cf. *Frothingham* v. *Mellon,* 262 U. S. 447; *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 478. Petitioner asserts that its status is more akin to that of a municipal taxpayer than a federal taxpayer, but analysis of the record reveals quite clearly that, as in *Frothingham* v. *Mellon, supra,* the effect herein of the challenged payment out of the fund upon future taxation is "so remote, fluctuating and uncertain, that no basis

is afforded for an appeal to the preventive powers of a court of equity." (*Id.* at 487).

To begin with, all common carriers covered by the Act are required to pay taxes at the same rate. Thus, unlike the statute involved in the *Gange* case, *supra,* the action here sought to be restrained could not affect the future rate payable by any particular employer but would affect the liability of all employers equally. Secondly, there is no basis for concluding that the general contribution rate would be directly or immediately affected by the payment of the benefits here in issue. The Act provides for the payment by the carriers of one-half of one percent of the compensation of each employee, not in excess of $300 per month, while the balance in the Railroad Unemployment Insurance Account is $450,000,000 or more. The rate payable increases by one-half of one percent when the Account falls below $450,000,000, and an additional one-half of one percent, up to a maximum of three per cent, for each $50,000,000 below that amount. (Sec. 8, 45 U.S.C. 358). As of September 30, 1950, the balance remaining in the Account was a little over $779,000,000 (R. 38), or $329,000,000 above the figure to which the balance would have to fall before employers would be required to pay at a higher rate. When this sum of $329,000,000 is compared with the benefits here involved—$38,000 (R. 37)—it is plain that there is no more than a bare possibility of injury in the future.

Moreover, it appears highly remote that any sub-

stantial changes in the balance in the Account will be produced by benefit payments such as those involved in this case. All unemployment benefits paid under the Act since operations commenced in 1939 and through September 30, 1950, amount to $311,622,000 (R. 40), a sum less than the amount by which the account exceeded $450,000,000 on September 30, 1950. Of this total, less than $2,000,000 has been paid to employees on strike (R. 40). In the past, the amount of unemployment benefits paid has varied from as low as $547,000 in the war year 1943-1944, to as high as $113,769,000 in 1949-1950. In the latter year, railroad traffic was affected drastically by the general business recession and by prolonged coal and steel strikes (R. 39). Accordingly, major changes in the balance have resulted, and will result, not from payments to employees on strike but from other factors such as fluctuations in business conditions which directly affect employment. It is entirely speculative, therefore, when the balance in the Account may reach the point at which the rate payable will increase. It has been estimated that, if the present annual payroll of the carriers covered by the Act is maintained and if benefit payments made continue at the amount which they have averaged for the past eleven years, the balance in the Account will remain above $450,000,000 until sometime after September 1962, but will be below that sum on September 30, 1963 (R. 39).

Finally, even assuming that the disputed payment of $38,000 was, in fact, illegal and would have a direct and immediate effect upon petitioner's contribution rate, petitioner could not show that it has suffered legal injury. Prior to 1948, the rate payable was fixed at three per cent and was not proportioned to the balance in the account (45 U.S.C. (1946 ed.) 358). Accordingly, the argument herein advanced by petitioner could scarcely have been raised under the Act, as originally enacted. See 83 Cong. Rec. 9071. And it is clear that the sliding scale of contributions initiated in 1948 (Act of June 23, 1948, 62 Stat. 576, 577-578) was not intended to result in a permanent minimum rate of one-half of one percent. The legislative history of the 1948 amendment demonstrates the understanding of Congress and the carriers that the minimum rate of one-half of one percent would not maintain the Account at an even level, that the purpose of the graduated tax was to give the carriers credit as to future taxes for the excessive taxes paid in the past until the Account had been reduced to a reasonable level, and that the tax rate would subsequently be stabilized at a percentage higher than the minimum of one-half of one percent. See Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 80th Cong., 2d sess., on H.R. 6766, pp. 7, 10; H.R. Rept. No. 2154, 80th Cong., 2d sess.; S. Rept. No. 1574, 80th Cong., 2d sess.; Hearings before a Subcommittee of the Committee

on Labor and Public Welfare, United States Senate, 80th Cong., 2d sess., on S. 994, S. 2055, S. 2228, S. 2300, S. 2423, S. 2437, and S. 2438, pp. 79, 88-90, 114-117, 130-132; Hearings before the Committee on Ways and Means, House of Representatives, 80th Cong., 2d sess., on H.R. 5711, pp. 3-7, 8-10, 21-23, 29-32, 34-38; Hearings before a Subcommittee of the Committee on Labor and Public Welfare, United States Senate, 80th Cong., 1st sess., on S. 670, pp. 7, 44, 181.

Accordingly, here, as in the *Gange* case, *supra*, "the injury, as it appears from this record, is neither so certain nor so substantial as to justify a finding, upon that showing, that [petitioner's] substantial rights have been or will be invaded by allowance and payment of the award" (326 U. S. at 305).[8]

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[8] Petitioner's reliance on *Stark* v. *Wickard*, 321 U.S. 288, is, therefore, misplaced. In that case, the Court expressly found that the statute endowed producers with the right to be paid a minimum price (*Id.* at 304, 309). In the instant case, petitioner has no definite and direct interest in the insurance account. Similarly, the state cases cited by petitioner (Pet. 16) are inapposite. In all those cases, the state statute involved specifically includes the employer among those entitled to judicial review.

CONCLUSION

The decision below is correct, and there is no conflict. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1951.

APPENDIX

Section 5 of the Railroad Unemployment Insurance Act (Act of June 25, 1938, 52 Stat. 1094, 1099), as amended by the Act of October 10, 1940, 54 Stat. 1098 and by the Act of July 31, 1946, 60 Stat. 738, 45 U.S.C. 355) provides in pertinent part as follows:

* * * * *

(c) Each qualified employee whose claim for benefits has been denied in whole or in part upon an initial determination with respect thereto upon a basis other than one which is reviewable pursuant to one of the succeeding paragraphs of this subsection, shall be granted an opportunity for a fair hearing thereon before a referee or such other reviewing body as the Board may establish or assign thereto.

Any claimant whose claim for benefits has been denied in an initial determination with respect thereto upon the basis of his not being a qualified employee, and any claimant who contends that under an initial determination of his claim he has been awarded benefits at less than the proper rate, may appeal to the Board for the review of such determination. Thereupon the Board shall review the determination and for such review may designate one of its officers or employees to receive evidence and to report to the Board thereon together with recommendations. In any such case the Board or the person so designated shall, by publication or otherwise, notify all parties properly interested of their right to participate in the proceeding and, if a hearing is to be held, of the time and place of the hearing. At

the request of any party properly interested the Board shall provide for a hearing, and may provide for a hearing on its own motion. The Board shall prescribe regulations governing the appeals provided for in this paragraph and for decisions upon such appeal.

In any case in which benefits are awarded to a claimant in whole or in part upon the basis of pay earned in the service of a person or company found by the Board to be an employer as defined in this Act but which denies that it is such an employer, such benefits awarded on such basis shall be paid to such claimant subject to a right of recovery of such benefits. The Board shall thereupon designate one of its officers or employees to receive evidence and to report to the Board on whether such benefits should be repaid. The Board may also designate one of its officers or employees to receive evidence and report to the Board whether or not any person or company is entitled to a refund of contributions or should be required to pay contributions under this Act, regardless of whether or not any claims for benefits will have been filed upon the basis of service in the employ of such person or company, and shall follow such procedure if contributions are assessed and payment is refused or payment is made and a refund claimed upon the basis that such person or company is or will not have been liable for such contributions. In any such case the Board or the person so designated shall, by publication or otherwise, notify all parties properly interested of their right to participate

in the proceeding and, if a hearing is to be held, of the time and place of the hearing. At the request of any party properly interested the Board shall provide for a hearing, and may provide for a hearing on its own motion. The Board shall prescribe regulations governing the proceedings provided for in this paragraph and for decisions upon such proceedings.

Final decision of the Board in the cases provided for in the preceding two paragraphs shall be communicated to the claimant and to the other interested parties within fifteen days after it is made. Any properly interested party notified, as hereinabove provided, of his right to participate in the proceedings may obtain a review of any such decision by which he claims to be aggrieved or the determination of any issue therein in the manner provided in subsection (f) of this section with respect to the review of the Board's decisions upon claims for benefits and subject to all provisions of law applicable to the review of such decisions. Subject only to such review, the decision of the Board upon all issues determined in such decision shall be final and conclusive for all purposes and shall conclusively establish all rights and obligations, arising under this Act, of every party notified as hereinabove provided of his right to participate in the proceedings.

Any issue determinable pursuant to this subsection and subsection (f) of this section shall not be determined in any manner other

than pursuant to this subsection and subsection (f).

* * * * *

(f) Any claimant, or any railway labor organization organized in accordance with the provisions of the Railway Labor Act, of which claimant is a member, or any other party aggrieved by a final decision under subsection (c) of this section, may, only after all administrative remedies within the Board will have been availed of and exhausted, obtain a review of any final decision of the Board by filing a petition for review within ninety days after the mailing of notice of such decision to the claimant or other party, or within such further time as the Board may allow, in the United States circuit court of appeals for the circuit in which the claimant or other party resides or will have had his principal place of business or principal executive office, or in the United States Circuit Court of Appeals for the Seventh Circuit or in the Court of Appeals for the District of Columbia. * * * Upon such filing the court shall have exclusive jurisdiction of the proceeding and of the question determined therein, and shall give precedence in the adjudication thereof over all other civil cases not otherwise entitled by law to precedence. It shall have power to enter upon the pleadings and transcript of the record a decree affirming, modifying, or reversing the decision of the Board, with or without remanding the cause for rehearing. The findings of the Board as to the facts, if supported by

evidence and in the absence of fraud, shall be conclusive. No additional evidence shall be received by the court, but the court may order additional evidence to be taken before the Board, and the Board may, after hearing such additional evidence, modify its findings of fact and conclusions and file such additional or modified findings and conclusions with the court, and the Board shall file with the court a transcript of the additional record. The judgment and decree of the court shall be final, subject to review as in equity cases. * * *

(g) Findings of fact and conclusions of law of the Board in the determination of any claim for benefits or refund, the determination of any other matter pursuant to subsection (c) of this section, and the determination of the Board that the unexpended funds in the account are available for the payment of any claim for benefits or refund under this Act, shall be, except as provided in subsection (f) of this section, binding and conclusive for all purposes and upon all persons, including the Comptroller General and any other administrative or accounting officer, employee, or agent of the United States, and shall not be subject to review in any manner other than that set forth in subsection (f) of this section.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1951.

**No. 223**

RAILWAY EXPRESS AGENCY, INCORPORATED,
*Petitioner,*

*vs.*

WILLIAM J. KENNEDY, ET AL.,
*Respondents.*

## REPLY BRIEF.

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## REPLY BRIEF.

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The brief of the Solicitor General in behalf of two of the three members of the Railroad Retirement Board opposing the petition for certiorari merely serves to indicate the inherent difficulties of the position which a majority of the Board has taken. However, in order that there may be no misunderstanding of the implications of that position, we feel it appropriate to make a few very brief observations with respect to the Solicitor General's brief.

First, by failing to defend the legality of the Board's determination that the strike of petitioner's employees was not commenced in violation of the Railway Labor Act, respondents take the unequivocal position that, however flagrant the Board's violation of the statutory restrictions on the payment of compensation, the carriers who must pay every penny of the money distributed by the Board cannot be heard in any forum to complain of its largess. Since

the recipients of benefits would be neither inclined nor entitled to complain, the necessary effect of respondents' position (and of the decision of the Court of Appeals), therefore, is that there is absolutely no method by which the Board may be kept within the limits prescribed by statute for the distribution of unemployment compensation. Such a result is wholly unreconcilable with this Court's statement in *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, 433-4 (1949), that the contention that a final administrative order is "not reviewable by any court even though entered arbitrarily, without substantial supporting evidence, and in defiance of law" is "out of harmony with the general legislative pattern of administrative and judicial relationships." Since the Solicitor General has failed to rationalize these apparently divergent views, we can only assume that he too recognizes the conflict.

Second, respondents' discussion of the Administrative Procedure Act (Resp. 9-10) not only assumes the answer to a close and undecided question of law but misses the point entirely with respect to the effect of the Act upon the right to judicial review of agency decisions. The question whether under section 2(a)(1) of the Administrative Procedure Act, 5 U. S. C. § 1001(a), the Railroad Retirement Board is exempt from all but the publicity requirements of the Act as an agency "composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them" has not been decided by the courts. Without attempting at this time to argue the question at length, it may be pointed out that even if it is assumed that the Board is composed of representatives of carriers and employees,[1] respondents

[1] The Railroad Retirement Board differs from such agencies as the National Railroad Adjustment Board, which Congress had particularly in mind in enacting section 2(a)(1) of the Administrative Procedure Act, in several important respects: (1) Only two

in this very case take the position (Resp. 4) that carriers are *not* proper parties to a dispute before the Board. Furthermore, while the House Committee Report lists the Railroad Retirement Board as one of the agencies exempted from the statute by the provision quoted, the Senate Report (S. Rep. No. 752, 79th Cong. 1st Sess.) does not, and Senator McCarran, chairman of the Senate Judiciary Committee, stated on the Senate floor that "*various functions* of such agencies as the Railroad Retirement Board are excluded from the provisions of the Act by the applicable language of *later sections.*" Sen. Doc. No. 248, 79th Cong. 2d Sess. p. 307. (Emphasis supplied.) In his view, obviously, the Board was not exempted by the language of section 2(a)(1). As this Court recently noted with respect to this Act, "The legislative history is more confusing than the text is ambiguous." *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, 49 (1950).

However, assuming that the Board is an agency exempted from theAdministrative Procedure Act by section 2(a)(1), it does not follow, as the Solicitor General argues, that the "obvious purpose" of such exemption was to restrict judicial review of orders of the Board within narrower compass than orders of agencies covered by the Act. That inference is wholly without basis for the reasons (1) that the exemption provision was inserted not because of the judicial review provisions of the Act but because the exempted agencies "do not lend themselves to the *adjudicative procedures* set out in the remaining sections of the bill" (S. Rep. No. 752, 79th Cong. 1st Sess.); and (2) that the judicial

of the three members of the Railroad Retirement Board are selected as representatives of employees and carriers respectively. The third member, by express statutory provision, "shall not be in the employment of or be pecuniarily or otherwise interested in any employer or organization of employees." 45 U. S. C. § 228j. (2) The members of the Railroad Retirement Board are appointed by the President, rather than by direct selection of the interested groups. Compare 45 U. S. C. § 228j with 45 U. S. C. §153.

review provisions were not intended to change but to define and codify the preexisting right to judicial review of agency action as stated in such decisions as *Stark* v. *Wickard,* 321 U. S. 288 (1944).

Third, the Solicitor General's treatment of the statutory provision which is claimed to preclude judicial review (Resp. 7-9) merely emphasizes the substantiality of petitioner's position, since he has found it advisable (1) to abandon the principal argument made by the General Counsel of the Board in the Court of Appeals, that the concluding paragraph of section 5(c) of the Railroad Unemployment Insurance Act precludes judicial review, and to rely entirely upon section 5(g) of the Act, 45 U. S. C. § 355(g); and (2) to rewrite the latter subsection. Subsection 5(g) is not divided into three separately numbered classes of determinations, as is implied at page 8 of respondents' brief. Instead that subsection grants finality only to "Findings of fact and conclusions of law of the Board in the determination of any claim for benefits or refund, the determination of *any other matter* pursuant to subsection (c) of this section, and the determination of the Board that the unexpended funds in the account are available for the payment of any claim for benefits or refund under this Act." (Emphasis supplied.)[2]

This language simply provides that when the Board makes findings of facts and conclusions of law in determinations of claims for benefits or any other matter pursuant to the procedure outlined in subsection (c)—which concededly was not done in this case—such findings and

[2] Petitioner has not abandoned the supporting argument that there are no findings of fact or conclusions of law made by the Board in a case of this character, as claimed in footnote 4, page 9 of respondents' brief. It is, of course, unnecessary to advance every available argument on the merits in a petition for certiorari, and as we shall show if the petition is granted, no findings of fact or conclusions of law of the Board are made in cases of this kind.

conclusions are final unless a statutory appeal is taken as provided in subsection (f). And, consistently, such statutory appeals can only be taken from determinations made under the procedures set out in subsection (c). Reduced to its substance, the Solicitor General is arguing that because the statute specifically requires employees to comply with the administrative and judicial review procedures set out in section 5(c) and (f), it must follow that carriers are thereby precluded from obtaining any review whatever of unlawful agency action depleting the trust fund which they must, by law, replenish.[3]

Fourth, with respect to respondents' treatment of *Gange Lumber Co.* v. *Rowley*, 326 U. S. 295 (1945), we agree that there was no discussion in that case of the question whether "the considerations governing justiciability, therein applied to constitutional issues, are not equally applicable to nonconstitutional issues" (Resp. 11), for the very good reason that there was no occasion for such a discussion, which would have been dictum, pure and simple. What is significant is that the Court carefully left that question open by confining its holding to questions "concerning the state's power" under the Fourteenth Amendment (326 U. S. at 305), thereby leading a student of the subject[4] to the conclusion that this Court would draw just such a distinction. It should be emphasized that the *Gange* case did not involve allegedly unlawful administrative action but a contention that mere extension by legislative action of the time within which employees could reopen their claims

[3] The third "class" of findings of fact and conclusions of law of the Board made final by section 5(g), that unexpended funds are available for the payment of claims for benefits, is obviously inapplicable, since it relates not to the decision of the validity of specific claims but to whether funds are available in the Account for their payment. No carrier could have any interest in challenging that determination if the claim itself was valid.

[4] Davis, *Standing to Challenge and to Enforce Administrative Action*, 49 Col. L. Rev. 759, 788 (1944).

for compensation on the ground of aggravation of injury, which could have been reopened by the agency in any event, deprived the employer of its property without due process of law, a contention which Mr. Justice Black dismissed as frivolous.

Finally, the fact that it is impossible to determine exactly what effect the unlawful payments will have upon petitioner's rate of contribution seems clearly beside the point. Petitioner has a justiciable interest sufficient to challenge the Board's action because it is one of a very small group whose members must inevitably pay any amounts unlawfully disbursed by the Board, and whose rate of contribution depends directly upon the amount remaining in the fund. To say that "there is no more than a bare possibility of injury in the future," as does the Solicitor General, is to ignore the fact that every penny unlawfully distributed by the Board will eventually have to be made up by a small group of taxpayers, of whom petitioner is one. Certainly, its interest is more direct and immediate than that of a municipal taxpayer, whose standing to sue was upheld by this Court in *Crampton* v. *Zabriskie,* 101 U. S. 601, 609 (1879), even apart from the sliding-scale contribution rate feature of the Act. The statement of the Solicitor General to the contrary (Resp. 13) is not and cannot be supported.

## Conclusion.

The brief submitted in behalf of respondents Kennedy and Harper, we submit, confirms the importance of a further hearing upon certiorari. We therefore respectfully renew our request that the petition be granted.

Respectfully submitted,

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